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IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KYRA BAULER, Defendant-Appellant.	SUPREME COURT NO. 22-1232

APPEAL FROM THE IOWA DISTRICT COURT
FOR PLYMOUTH COUNTY
HONORABLE JEFFREY A. NEARY, JUDGE

APPELLANT'S AMENDED BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 5th day of September, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Kyra R. Bauler, 1701 Grandview Blvd, Sioux City, IA 51105.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Because Deputy Vander Berg did not have sufficient cause to stop Bauler's car, did the stop violate Bauler's rights under the Fourth Amendment and article I, section 8?

Authorities

State v. Lovig, 675 N.W.2d 557, 562 (Iowa 2004)

State v. Tyler, 830 N.W.2d 288, 291 (Iowa 2013)

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II. Did the K9 sniff of Bauler's car violate her rights under article I, section 8 and the Fourth Amendment against unreasonable searches because the dog and the officer physically trespassed on her car when conducting the sniff?

Authorities

State v. Bergmann, 633 N.W.2d 328 (Iowa 2001)

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State v. Ingram, 914 N.W.2d 794, 816–17 (Iowa 2018)

State v. Dorff, ___ P.3d ___, ___, 2023 WL 2563783, at *9 (Idaho 2023)

III. Did the search of Bauler's purse without a warrant violate her rights under article I, section 8 and the Fourth Amendment?

Authorities

State v. Naujoks, 637 N.W.2d 101, 106 (Iowa 2001)

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ROUTING STATEMENT

This appeal involves issues stemming from the traffic stop and subsequent search of Kyra Bauler's car and purse following a canine sniff of the car. The case should be retained by the Iowa Supreme Court because two issues raised are substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

First, the search of Bauler's purse raises the question left unanswered in State v. Rincon, 970 N.W.2d 275 (Iowa 2022), which held it was appropriate for law enforcement to search a backpack that had been removed from a car pursuant to the automobile exception because the backpack had been present in the car at the time probable cause arose. In this case, Bauler's purse had been removed from her car before the dog sniff occurred and the dog alerted, indicating the presence of drugs in the car.

Further, this case raises the issue of whether a dog sniff in which both the officer and the dog repeatedly touch and jump

against the car violates the car owner's rights against unreasonable searches. The Iowa Supreme Court has recently accepted further review in State v. Arrieta, No. 21-1133, which raises the same legal issue under slightly different facts.

STATEMENT OF THE CASE

Nature of the Case: Kyra Bauler appeals from her convictions, judgment and sentences for possession of contraband in a correctional facility, possession of methamphetamine, and operating while intoxicated, following a bench trial on a stipulated record in the Plymouth County District Court.

Course of Proceedings: Following a traffic stop on January 29, 2021, the State charged Kyra Bauler with operating while intoxicated, first offense, a serious misdemeanor in violation of Iowa Code § 321J.2(2)(a) (2021). (Trial Information OWCR018822) (App. pp. 5-6). The State later filed another trial information adding additional charges: 1) possession with intent to deliver more than five grams of methamphetamine, a

class B felony in violation of Iowa Code section 124.401(1)(b)(7) (2021); 2) introduction of contraband (methamphetamine) into a correctional facility, a class D felony in violation of Iowa Code section 719.7(3)(a) (2021); and 3) possession of a controlled substance, third offense, a class D felony in violation of Iowa Code section 124.401(5) (2021). (Trial Information FECR018888) (App. pp. 7-8). Bauler pled not guilty and waived speedy trial in both cases. (Written Arraignment OWCR018822; Written Arraignment FECR018888) (App. pp. 9-11).

In the drug possession case, Bauler moved to suppress evidence seized following the dog sniff of her car during the traffic stop. (Motion to Suppress FECR018888) (App. pp. 12-13). Bauler also argued the initial traffic stop was not supported by sufficient cause. (Supp. Tr. vol I 18:5 – 20:1). After a hearing, the district court denied the motion. (Ruling on MTS FECR018888) (App. pp. 15-24).

In the OWI case, Bauler moved to suppress evidence obtained after the stop, arguing the stop was not supported by sufficient cause. (Motion to Suppress OWCR018822) (App. pp. 25-26). The district court concluded the issue raised in motion to suppress was already decided by the district court in the drug possession case, issue preclusion applied, and declined to hold a hearing. (Ruling on MTS OWCR018822) (App. pp. 50-52).

The State and Bauler reached an agreement to resolve both cases and preserve Bauler's right to appeal the suppression rulings. (Agreement) (App. pp. 42-49). Bauler agreed to submit to a bench trial on a stipulated record on counts II (introduction of contraband) and count III (possession of meth) in FECR018888 and the OWI in OWCR018822. (Agreement) (App. pp. 42-49). Sentencing was also agreed upon. (Agreement) (App. pp. 42-49).

After the bench trial, the district court found Bauler guilty of all three counts. (Verdict) (App. pp. 53-66). The court sentenced Bauler in accordance with the agreement between

the parties. In FECR018888, the court sentenced Bauler to two five-year indeterminate terms of incarceration to run consecutively. The sentences were suspended, and Bauler was placed on supervised probation for two years. The court also suspended the minimum fines. (Sentencing Order FECR0188888 pp. 2-5) (App. pp. 68-71). In OWCR018822, the court sentenced Bauler to 365 days in jail, suspending all but two days. The court imposed a $1250 fine. (Sentencing Order OWCR018822) (App. pp. 82-86).

Bauler filed timely notices of appeal in both cases. (Notice of Appeal FECR018888; Notice of Appeal OWCR018822) (App. pp. 87-89). The Iowa Supreme Court consolidated the two appeals. (Order to Consolidate) (App. pp. 90-92).

Facts: While on patrol on the evening of January 29, 2021, Plymouth County Deputy Vander Berg observed Kyra Bauler driving slower than the speed limit on Highway 75, a four-lane divided highway. She followed Bauler's car and estimated she was driving 55 mph where the speed limit was 65

mph. (Supp. Tr. vol. II, 4:23 – 5:19; 9:5 – 10:9) (State's Ex. 3 p. 1) (Conf. App. p. 11). There was no minimum speed limit on the road. The car pulled into a Casey's parking lot, and Deputy Vander Berg ran the license plate number. Deputy Vander Berg learned that Bauler, as the registered owner, had past drug offenses. (Supp. Tr. vol. II, 10:10 - 11:19; 20:19 – 22:2; 24:22 – 25:24) (State's Ex. 3 p. 1) (Conf. App. p. 11).

Deputy Vander Berg continued to follow Bauler after she left Casey's. Vander Berg estimated that Bauler was driving about 45 mph, even slower than before. She testified that Bauler was creating a hazard because traffic was still heavier than normal and cars were backing up to try to pass her in the left lane. Vander Berg also observed that one of Bauler's plate lights may have been out. (Supp. Tr. vol. II, 6:13 – 7:24; 11:20 – 13:16) (State's Ex. 3 p.1)(Conf. App. p. 11).

She followed Bauler for approximately fifteen minutes and observed her cross the center line several times and touch the white fog line twice. Vander Berg called LeMars police officer

Bob Rohmiller and asked him to start his evening shift early and bring his drug dog to the scene because she was going to stop Bauler and wanted him to conduct a dog sniff of Bauler's vehicle. He agreed. Vander Berg waited until Bauler exited Highway 75 to initiate a traffic stop, activating her lights and dash camera. (Supp. Tr. vol. I, 7:11 -23; Supp. Tr. vol. II, 5:6 – 6:12; 7:25 – 8:22; 13:17 – 16:20; 18:22 – 19:10; 25:25 – 26:25; 27:4-21) (State's Ex. 3 p. 1-2; State's Ex. 13 p. 1) (Conf. App. pp. 11-12, 18). After Bauler pulled over to the side of the road, Deputy Vander Berg approached the driver's side window. Vander Berg explained the reason for the stop and requested Bauler's license, registration and proof of insurance. She also requested ID from the passenger. When Bauler was unable to produce proof of insurance, Vander Berg asked her to come back to the squad car. Bauler complied, bringing her purse and a pile of paperwork with her to the squad car. Her passenger remained in the car. (State's Ex. 3, p. 2) (Conf. App.

p. 12); (State's Ex. 4 at start – 19:44:08); (State's Ex. 5 at start – 19:44:02).

Bauler sat in the passenger seat, still looking through paperwork for her insurance information. Vander Berg began processing "warnings and a citation for the lack of insurance." Vander Berg asked Bauler if she had anything illegal in the car and if she would give them permission to search the car. Bauler declined. Vander Berg explained that she was going to have a drug dog conduct a sniff of the car. (State's Ex. 3 p. 2) (Conf. App. p. 12) (State's Ex. 5 at 19:44:08 – 19:47:00).

About five minutes later, Officer Rohmiller arrived on the scene with his canine. He again asked if Bauler would consent to a search, and she again declined. Deputy Vander Berg tried to talk Bauler into letting the dog search the interior of her car, but Bauler continued to refuse. (Supp. Tr. vol I, 7:11 – 8:1; 12:11-14) (State's Ex. 13 p. 1) (Conf. App. p. 18) (State's Ex. 5 at 19:51:55 – 19:53:01) After removing the passenger from the car, Rohmiller led the dog around Bauler's car twice, tapping

and patting the car to direct the dog to sniff in particular areas. The dog jumped against the car, putting its front paws on the car multiple times. (State's Ex. 4 at 19:53:15 – 19:54:30); (Supp. Tr. vol. I, 8:17-23; 9:13 – 10:15; 11:15 – 12:10) (State's Ex. 13, p. 1) (Conf. App. p. 18). Bauler complained about the dog jumping on her car, worried it was scratching her car. Vander Berg told her that this was normal and she was lucky that this dog was a passive alert dog, because active alert dogs are trained to scratch when they detect drugs. She explained that if Bauler had consented to a search, they wouldn't have needed to call the dog. Just as Officer Rohmiller completed a second loop around Bauler's car, Vander Berg printed the citations. (State's Ex. 5 at 19:53:01 - 19:54:15).

Officer Rohmiller returned to the squad car and told Vander Berg that the dog alerted on the passenger side door.[1] He asked Bauler when was the last time someone had been in

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[1] Because of the angle of the dash cam in Vander Berg's squad car, the passenger side of Bauler's car is not visible. Accordingly, the dog's signal is not captured on video.

the car with illegal drugs. Bauler denied knowing anything about drugs being in her car. Deputy Vander Berg announced that she was beginning a drug investigation based on the dog's alert and they were going to search Bauler's car. (Supp. Tr. vol. I, 9:10-12; 10:16 - 19) (State's Ex. 5 at 19:54:15 – 19:55:00).

Vander Berg ordered Bauler out of the squad car and patted her down. After some discussion, it was agreed that Bauler could sit in the squad car with another officer while Vander Berg searched the vehicle. Vander Berg removed Bauler's purse from the front seat of the squad car and placed it on the hood. (State's Ex. 5 at 19:55:00 – 19:57:28). Rohmiller and Vander Berg first searched Bauler's car – both the passenger compartment and the trunk. Vander Berg located some pipes in a sunglasses case. (State's Ex. 5 at 19:57:29 – 20:06:01). Vander Berg returned to her squad car, where Bauler had been moved to the back seat. She searched Bauler's purse. Inside she found a makeup container with a

white crystalline residue and small vial also with a white residue. (State's Ex. 5 at 20:06:01 – 20:12:04).

The officers had found two sealed mailing packages in the car, and Vander Berg asked Bauler if they could search the packages. Bauler refused, but then when she found out the alternative was that the officers would seize the envelopes until they got a warrant to search them, she agreed to open the packages. Inside, officers found several key fobs and a scale with white residue on it. (State's Ex. 3 p. 2-3) (Conf. App. pp. 11-12) (State's Ex. 4 at 19:57:40 – 20:17:28) (State's Ex. 5 at 20:12:05 – 20:15:30).

Bauler was arrested for possession of paraphernalia and driven to the jail. At the jail, she was searched, and then was subjected to a drug evaluation by Officer Rohmiller. Officer Rohmiller concluded Bauler was under the influence of a central nervous system stimulant and was unable to drive safely. She was then read her rights under Iowa Code § 804.20. She refused to provide a urine sample, and she was

arrested for OWI. While being booked into the jail, she was strip searched and jail personnel located two baggies on methamphetamine concealed in her vagina. The baggies each contained slightly more than 3.5 grams of methamphetamine. (State's Ex. 3, p. 3-7); (State's Ex. 13 p. 1-3) (Conf. App. pp. 18-20); (Supp. Tr. vol. I 13:21 – 17:10). (State's Ex. 5 at 20:23:19 – end) (State's Ex. 6 & 7).

ARGUMENT

I. Because Deputy Vander Berg did not have sufficient cause to stop Bauler's car, the stop violated Bauler's rights under the Fourth Amendment and article I, section 8.

A. Error Preservation: Bauler moved to suppress the evidence obtained during the stop, arguing the stop was unconstitutional, citing both the Iowa and federal constitutions. (Motion to Suppress FECR018888; Motion to Suppress OWCR018822) (App. pp. 12-13, 25-26). A hearing was held on the motion in FECR018888, the court denied Bauler's motion, finding there was sufficient cause for the stop. (Ruling on MTS FECR018888, p. 6) (App. p. 20). In OWCR018822, at the State's urging, the district court concluded the suppression

argument was precluded by the district court's ruling in FECR018888, declined to hold a hearing, and denied the motion. (State's Supp. Resistance OWCR018822; Ruling on MTS OWCR018822) (App. pp. 27-41, 50-52). Thus, error has been preserved. State v. Lovig, 675 N.W.2d 557, 562 (Iowa 2004).

B. Standard of Review. Constitutional claims are reviewed de novo. State v. Tyler, 830 N.W.2d 288, 291 (Iowa 2013). "A de novo review constitutes an independent evaluation of the totality of the circumstances as shown by the entire record." Id. Although the appellate court will give deference to the factual findings of the district court, it is not bound by the findings. Id. In conducting its review, the court will consider evidence presented at the suppression hearing as well as evidence presented at trial. State v. Kinkead, 570 N.W.2d 97, 99 (Iowa 1997).

C. Discussion: The Fourth Amendment of the United States Constitution and article 1, section 8 of the Iowa

Constitution prohibit "unreasonable searches and seizures." "[S]topping an automobile and detaining its occupants constitute a 'seizure' ... even though the purpose of the stop is limited and the resulting detention quite brief." Delaware v. Prouse, 440 U.S. 648, 653 (1979). Stopping a vehicle is an unreasonable seizure unless the officer has either (1) probable cause due to the observation of a traffic violation or (2) reasonable suspicion, supported by articulable facts, that a criminal act has occurred or is occurring. State v. Pals, 805 N.W.2d 767, 773-74 (Iowa 2011); State v. Tague, 676 N.W.2d 197, 201–04 (Iowa 2004).

The determination of whether a reasonable suspicion existed is based on an objective standard: whether the facts available to the officer at the time of the stop would lead a reasonable person to believe that the action taken by the officer was appropriate. Terry v. Ohio, 392 U.S. 1, 21–22 (1968); State v. Mitchell, 498 N.W.2d 691, 693 (Iowa 1993). "An

unparticularized suspicion or hunch is not enough to establish reasonable suspicion." Kinkead, 570 N.W.2d at 100.

In order to establish reasonable suspicion, the State bears the burden of showing that the officer identified "specific and articulable facts, which taken together with rational inferences from those facts, to reasonably believe criminal activity may have occurred." State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004). "Mere suspicion, curiosity, or hunch of criminal activity is not enough." If the State fails to carry its burden, the evidence obtained through the investigatory stop must be suppressed. State v. Wiese, 525 N.W.2d 412, 414 (Iowa 1994).

In this case, the State made no explicit argument regarding the justification for Vander Berg's stop of Bauler's vehicle, other than a general resistance to Bauler's motion to suppress. (State's Resistance to MTS FECR018888) (App. p. 14). No argument was made by the State during the suppression hearing. (Supp. Tr. vols. I, II). The district court rejected Bauler's argument that probable cause was needed to

support the stop, concluding reasonable suspicion that criminal activity is afoot is sufficient. (Ruling on MTS FECR018888, p. 1-2) (App. pp. 15-16). The court determined that because Bauler "was observed crossing the centerline and riding the fog line for a notable period of time," "Deputy Vander Berg had reasonable suspicion to stop Ms. Bauler's vehicle to investigate whether there was criminal activity afoot." (Ruling on MTS FECR018888, p. 2) (App. p. 16). The suspected criminal activity was not identified in the ruling.

Deputy Vander Berg testified that she stopped Bauler's car because Bauler was driving slowly, "riding" the fog line, and crossed the center line. At about 7:15pm on a January night, Bauler's car initially caught her attention because it was traveling at an estimated 55 mph on Highway 75, a highway with a maximum speed limit of 65 mph and no minimum speed limit. (Supp. Tr. vol. II, 9:5 – 10:13) (State's Ex. 3, p. 1) (Conf. App. p. 11). She continued to follow the car for an undisclosed amount of time and saw it exit the highway and pull into a

Casey's in Hinton, Iowa, without noting any other driving violations or odd driving behavior. (Supp. Tr. vol. II, 10:14-24) (State's Ex. 3, p.1) (Conf. App. p. 11).

When the car left Casey's and returned to Highway 75, Vander Berg continued to follow it. She estimated that the car was now traveling at about 45 mph. (Supp. Tr. vol. II, 11:20 - 13:16) (State's Ex. 3, p. 1) (Conf. App. p. 11). Deputy Vander Berg followed Bauler for approximately fifteen minutes after she left the Casey's in Hinton. (Supp. Tr. vol. II, p. 5:25 – 6:16; 14:20-24) (State's Ex. 3, p. 1) (Conf. App. p. 11). At some point after Bauler left Casey's, Deputy Vander Berg observed the car "ride the fog line for some time and then have a slight cross of the center line." (Supp. Tr. vol. II 6:17 – 8:8) (State's Ex. 3, p. 1) (Conf. App. p. 11). Vander Berg then began observing the car more closely, concentrating on the driving behavior. She noted that "the vehicle crossed the centerline two additional times that were very clear crosses, that being both wheels on the driver's side going completely across the dotted line."

(State's Ex. 3, p. 1) (Conf. App. p. 11). At that point, Deputy Vander Berg decided to stop Bauler's vehicle. She realized they were close to the Le Mars exit and she waited to see if Bauler would exit, thinking it would be safer to conduct the stop off Highway 75. When Bauler did exit, Vander Berg activated her lights and dash cam. (State's Ex. 4) (Supp. Tr. vol. II, 14:20 – 18:13).

Without a video recording, Deputy Vander Berg's testimony and report provides the only evidence to provide a basis for the stop. Iowa caselaw reveals that swerving within one's lane *may* provide sufficient suspicion of impairment to justify an investigatory stop. However, the particular characteristics of the driving are critical to establish that the officer's suspicion is reasonable.

> We do not believe . . . that observations of a vehicle weaving within one's own lane of traffic will always give rise to reasonable suspicion for police to execute a stop of the vehicle. Rather, the facts and circumstances of each case dictate whether or not probable cause exists to justify stopping a vehicle for investigation.

State v. Otto, 566 N.W.2d 509, 511 (Iowa 1997). This is because swerving while operating a vehicle is commonplace. "Drivers talking on their cell phone, looking at a map, adjusting the radio, adjusting the heater, defroster or air conditioner, or checking on a child restrained in the back seat can lead a driver to momentarily cross an edge line, without giving rise to a reasonable suspicion of intoxication or fatigue." Tague, 676 N.W.2d at 205.

The Iowa Supreme Court has held that an officer had reasonable suspicion to stop a driver who, over the course of three and a half miles, was driving fifteen miles below the speed limit, was "veering left and right at sharp angles," "going left and right and back constantly," and varying her speed frequently. Otto, 566 N.W.2d at 510-11.

In Tague, however, the Iowa Supreme Court concluded a stop was not justified when the officer "testified he did not observe Tague driving erratically and could not recall whether Tague's vehicle was weaving on the roadway." Tague, 676

N.W.2d at 200-01. Over the course of a mile, the officer observed the driver's side wheels cross over the left edge line of the road and return to the roadway and stopped the vehicle. Tague, 676 N.W.2d at 200. The Court concluded this was insufficient to support the stop. Tague, 676 N.W.2d at 206.

Since Tague, the decisions of the Iowa appellate courts have made clear that there is no magic number of line touches or swerves that will automatically justify a stop—instead, as directed, all of the circumstances regarding a driver's driving will be used to evaluate whether the stop was justified. State v. Lobo is demonstrative. Lobo was stopped at 1:40am after an officer first noticed him merge onto Interstate 80. The officer observed that "[w]hen he merged on, he did not merge into or onto Interstate 80 eastbound until the very last moment, crossing, basically, the white solid line markers, what we call the gore area, before merging onto the interstate kind of at the last minute or last second of the ramp." State v. Lobo, No. 17-1768, 2019 WL762192 at *1 (Iowa Ct. App., Feb. 20, 2019).

After merging, Lobo left his turn signal on for a "considerable distance" after merging. Id. The officer followed Lobo, and turned on his in-car camera. Lobo was then observed making lane violations on both the right and left side. "And he was basically, what I consider, weaving within his lane and actually crossing outside of his traveled portion of his lane multiple times. I believe I counted roughly five to the left and two to the right before I made the traffic stop." Id. These observations were made over the course of three and a half miles. Id.

The majority of the panel of the court of appeals concluded the officer's observations, verified by the recording from the officer's camera, justified the stop. Id. at *3 (citing cases). The dissent, however, would have reversed.

> While the majority distinguishes Martinez Lobo's driving as "much more than" intra-lane weaving or briefly crossing an edge line, it misses the crux of Tague and Otto—the recognition that drivers rarely maintain a precise progression on the highway, even when they are neither intoxicated nor fatigued. See Tague, 676 N.W.2d at 205 (explaining "talking on their cell phone, looking at a map, adjusting the radio, adjusting the heater, defroster, or air conditioner, or checking a child restrained in the

> back seat can lead a driver to momentarily cross an edge line, without giving rise to reasonable suspicion of intoxication or fatigue."). Trooper Lampe acknowledged the "host of things" that could have been going on with the Camaro's driver. But the trooper did not articulate how the slight deviations in the Camaro's drive path justified an investigatory stop.

Id. at *6 (Tabor, J., dissenting). The dissent also collected cases with similar fact patterns in which the court of appeals had concluded no reasonable suspicion existed to justify a stop. Id. at *7 (collecting cases).

In this case, the State has not established that Deputy Vander Berg had a reasonable suspicion that criminal activity was afoot to justify stopping Bauler's car. Vander Berg observed Bauler's car on a four-lane divided highway between 7:00 and 7:30 pm on a January evening. She testified Bauler was driving well under the speed limit, but there was no indication that Bauler's speed was fluctuating or was otherwise erratic—just slower than normal. She saw Bauler "ride the fog line" for an undisclosed amount of time and touch the center line. Notably, the center line was not the center line dividing

traffic traveling in opposite directions, but the center line between the lanes of traffic traveling in the same direction. Then, the officer saw the driver's side of the car cross the center line twice. However, Vander Berg provided no description of Bauler's driving surrounding the momentary crossing of the center line. Although Vander Berg had testified traffic was heavy at that time of night, she did not indicate that Bauler's crossing of the center line created danger to other cars that might have been around, or whether it even occurred when other cars were nearby. Because Vander Berg had not activated her dash camera, and because she provided no further description, there is no basis to conclude that Bauler's driving was otherwise erratic. Further, Vander Berg's observations came over the course of fifteen minutes, which translates to a distance of 11.25 miles, assuming Bauler was traveling 45 mph.[2] She had decided to stop Bauler after the second crossing of the center line, but waited until Bauler exited the

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[2] According to Google Maps, the total distance on Highway 75 from the Hinton exit to the Le Mars exit is 12.6 miles.

highway, apparently observing no other suspicious driving behavior. The fact that Vander Berg felt comfortable delaying the stop until Bauler had exited the highway further demonstrates the lack of urgency created by Bauler's driving.[3] Under these circumstances, where the only articulated suspicion involved driving under the speed limit and touching the center line three times and the fog line once over the course of more than fifteen minutes (or more than eleven miles), the State has not met its burden to show that the stop was justified by reasonable suspicion and the stop was justified under the Fourth Amendment and article 1, section 8.

D. Conclusion. Because Vander Berg's stop of Bauler's vehicle was not supported by sufficient suspicion and violated both the Fourth Amendment and article I, section 8, the district court erred by not suppressing the evidence gained from the

[3] No suspicious driving is observed from the time when Vander Berg activated her lights and camera until Bauler stops along the side of the road. (State's Ex. 4 start – 19:41:57).

stop. Bauler's convictions should be vacated and her case remanded for further proceedings.

II. The K9 sniff of Bauler's car violated her rights under article I, section 8 and the Fourth Amendment against unreasonable searches because the dog physically trespassed on her car in conducting the sniff.

A. Error Preservation: Bauler moved to suppress the evidence obtained following the canine sniff of her vehicle, claiming the sniff violated Bauler's rights under article I, section 8 and the Fourth Amendment because both the officer and the dog repeatedly touched Bauler's car during the procedure. (Motion to Suppress FECR018888) (App. pp. 12-13). A hearing was held on the motion, and the court denied Bauler's motion, finding that State v. Bergmann, 633 N.W.2d 328 (Iowa 2001), controlled the outcome. (Ruling on MTS FECR018888, p. 7) (App. p. 21). Pursuant to the agreement by which Bauler submitted to a bench trial on a stipulated record in both underlying cases, the court reconsidered its ruling on the motion to suppress. The court "decline[d] to modify or reverse its ruling(s) on the Motion to Suppress" in both cases. (Verdict,

p. 12) (App. p. 65). Thus, error has been preserved. State v. Lovig, 675 N.W.2d 557, 562 (Iowa 2004).

B. Standard of Review. Constitutional claims are reviewed de novo. Tyler, 830 N.W.2d at 291. "A de novo review constitutes an independent evaluation of the totality of the circumstances as shown by the entire record." Id. The appellate court is not bound by the district court findings, but it will give deference to them. Id. In conducting its review, the court will consider evidence presented at the suppression hearing as well as evidence presented at trial. Kinkead, 570 N.W.2d at 99.

C. Discussion. Both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect against unreasonable searches. U.S. Const. Amend. IV.; Iowa Const. Art. I, § 8. "It is well-settled that warrantless searches are virtually 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' " State v. Baldon, 829 N.W.2d 785, 791

(Iowa 2013) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)). The "automobile exception" permits the warrantless search of a motor vehicle "when probable cause and exigent circumstances exist at the time the car is stopped by the police." State v. Storm, 898 N.W.2d 140 (2017) (quoting State v. Holderness, 301 N.W.2d 733, 736 (Iowa 1981)). The inherent mobility of an automobile generally satisfies the "exigent circumstances" requirement. Id. (citing Holderness, 301 N.W.2d at 737). A well-trained drug-detection dog's indication that narcotics are present within a vehicle can provide probable cause to search. State v. Bergmann, 633 N.W.2d 328, 338 (Iowa 2001).

"A dog sniff that occurs outside a vehicle is not a search under the meaning of the Fourth Amendment." Bergmann, 633 N.W.2d at 334. The United States Supreme Court has explained this is because of two separate rationales: first, dog sniffs are "binary," revealing only the presence or absence of contraband rather than other more detailed private information,

and second, dog sniffs are less invasive than other investigative methods. United States v. Place, 462 U.S. 696, 707 (1983). In Place, the Court emphasized that a dog sniff was minimally invasive because it did not require law enforcement to physically intrude into an area where the defendant has a constitutionally-protected interest—in that case, an article of luggage. Id.

On the other hand, a dog sniff that takes place in a constitutionally-protected area *is* a search, because "[t]he [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." Florida v. Jardines, 569 U.S. 1, 5 (2013) (quotations and citations omitted). In Jardines, police brought a dog onto the defendant's front porch and had it sniff the door to his home, then obtained a search warrant based on

the dog's indication that narcotics were present. Jardines, 569 U.S. at 4. The Court found the dog intruded on a constitutionally-protected area by entering the front porch for the purpose of gathering evidence, and that when such an intrusion occurs it is unnecessary to engage in an expectation-of-privacy analysis because "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." Jardines, 569 U.S. at 11. And so, even though the Court has also noted that "[o]ne who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it," Byrd v. United States, 138 S. Ct. 1518, 1527 (2018), when the government physically intrudes into an individual's property for the purpose of gathering information it is unnecessary to weigh and speculate about the subjective and objective privacy interests involved. The intrusion itself is

enough. Although the property at issue in Jardines was the defendant's home, the rule is not restricted to houses; the same impermissible intrusion also occurs when the government invades an individual's vehicle in order to obtain information, because "it is beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment." United States v. Jones, 565 U.S. 400, 404 (2012) (citation omitted).

The Iowa Supreme Court has also acknowledged the significance of a physical intrusion on effects when evaluating the reasonableness of a search under the Iowa Constitution. State v. Wright, 961 N.W.2d 396, 416-17 (Iowa 2021) (holding that officer's search of defendant's trash left at the curb violated defendant's right to be free from unreasonable searches and seizures). "Article I, section 8 precludes a peace officer from engaging in general criminal investigation that constitutes a trespass against a citizen's house, papers, or effects." Wright, 961 N.W.2d at 417. Article I, section 8 recognizes that Iowans enjoy a strong privacy interest in their effects, including their

cars. See State v. Ingram, 914 N.W.2d 794, 816–17 (Iowa 2018).

In this case, Officer Rohmiller conducted a K-9 sniff of Bauler's car, running the dog around the car twice. (State's Ex. 4 at 19:53:15 – 19:54:29). During the sniff, Officer Rohmiller continuously touches and taps Bauler's car. The dog responds by repeatedly jumping against the car, placing its front paws on the car and pressing its nose to the car. Because of the low lighting and the angle, it's hard to tell how often Rohmiller actually makes contact with the vehicle, but the dog seen jumping on the car at least nine separate times. (State's Ex. 4 at 19:53:15 – 19:54:29). Officer Rohmiller testified that it was his practice to direct the dog where to sniff, particularly to "different crevices on the vehicle such as where the doors open and close, the grill of the vehicle, the trunk area" sometimes by pointing and sometimes by tapping or touching the car. He also testified that it was normal for the dog to respond by putting his paws on the car. (Supp. Tr. vol. I, 7:11

– 10:15; 11:15 – 12:14). Officer Rohmiller also agreed that the closer the dog is to the car, the better it will be able to smell the odors from inside the car. (Supp. Tr. vol. I, 12:24 – 13:16).

Because both Officer Rohmiller and the dog physically trespassed on Bauler's car with the purpose of obtaining evidence, the sniff of the vehicle constituted a search. "A constitutional search occurs whenever the government commits a physical trespass against property, even where de minimis, conjoined with 'an attempt to find something or to obtain information.' " Wright, 961 N.W.2d at 413–14 (quoting Jones, 565 U.S. at 408 n.5). See also State v. Dorff, ___ P.3d ___, ___, 2023 WL 2563783, at *9 (Idaho 2023) (concluding when drug dog jumped onto and planted front paws on driver's door to sniff the upper seams of the car during a sniff, the dog committed a trespass and violated the driver's Fourth Amendment rights).

D. Conclusion. The dog sniff of Bauler's car in this case was not the type of "free air sniff" conducted outside of a car sanctioned by Bergmann, 633 N.W.2d at 334. Instead, because

both Officer Rohmiller and the dog repeatedly physically intruded onto Bauler's car, the sniff was an unauthorized search of her car under both the Fourth Amendment and article I, section 8. The district court erred in denying Bauler's motion to suppress. Accordingly, Bauler's convictions should be vacated and her case remanded to the district court for further proceedings.

III. The search of Bauler's purse without a warrant violated her rights under article I, section 8 and the Fourth Amendment.

A. <u>Error Preservation</u>. The State and Bauler reached an agreement to resolve both cases and preserve Bauler's right to appeal the suppression rulings. (Agreement) (App. pp. 42-49). Bauler agreed to submit to a bench trial on a stipulated record on counts II (introduction of contraband) and count III (possession of meth) in FECR018888 and OWI in OWCR018822. (Agreement) (App. pp. 42-49). At the bench trial hearing, Bauler requested the court revisit its ruling on the motion to suppress:

> [A]s the Court reviews the evidence submitted for trial purposes, we'd also ask that the Court review its decision on the motion to suppress filed October 15 of 2021 and its ruling on December 29, 2021, and take that as a renewed motion to suppress, when the Court has full review of all the evidence.
>
> In particular -- While I know the Court's ruling dealt with this issue, the legitimacy or illegitimacy of the initial traffic stop, the credibility of the officer, and *particularly the probable cause that may or may not have existed before the independent search of her purse, which was separate from any K-9 sniff of the vehicle,* just have the Court review that as all of its grounds for the search, and just indicate in its ruling on the minutes any additional findings the Court may have having reviewed the full file.

(Bench Tr. 7:5-23). The district court noted in its verdict that the motion to suppress was renewed. (Verdict, p. 2) (App. p. 54). The court, after "a renewed review of all the evidence, the Court decline[d] to modify or reverse its ruling(s) on the Motion to Suppress," and denied the motions. (Verdict, p. 12) (App. p. 64). Error has been preserved. See State v. Naujoks, 637 N.W.2d 101, 106 (Iowa 2001) ("An adverse ruling on a motion to suppress will preserve error for our review.").

B. Standard of Review. Constitutional issues are reviewed de novo. State v. Rincon, 970 N.W.2d 275, 280 (Iowa

2022). "A de novo review constitutes an independent evaluation of the totality of the circumstances as shown by the entire record." Tyler, 830 N.W.2d at 291. Although the appellate court will give deference to the factual findings of the district court, it is not bound by the findings. Id. In conducting its review, the court will consider evidence presented at the suppression hearing as well as evidence presented at trial. Kinkead, 570 N.W.2d at 99.

C. Discussion. The Fourth Amendment and article I, section 8 both protect against unreasonable searches and seizures. U.S. Const. Amend. IV.; Iowa Const. Art. I, § 8. Searches conducted without a warrant are "per se unreasonable," subject to only a few exceptions. Rincon, 970 N.W.2d at 280. The automobile exception is one.

Pursuant to the automobile exception, police may search a vehicle without a warrant if there is probable cause to believe it contains contraband. Rincon, 970 N.W.2d at 280. See also Michigan v. Thomas, 458 U.S. 259, 261 (1982). "[W]hen police

officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle." Thomas, 458 U.S. at 261. Passengers' belongings may be searched as well. Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("[P]olice officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search.").

The Iowa Supreme Court recently considered whether a passenger's backpack may be searched pursuant to the automobile exception when the backpack was not in the car at the time of the search but was inside the car when probable cause arose to search the car. Rincon, 970 N.W.2d at 282-83. The Court reaffirmed the holding of State v. Eubanks, 355 N.W.2d 57, 60 (Iowa 1984), and concluded that under both the Iowa Constitution and the United States Constitution, police may search a container that could contain contraband if the container was in the vehicle at the time probable cause arose to

search the car. Rincon, 970 N.W.2d at 286. However, the Court also cited numerous cases concluding a container may not be searched pursuant to the automobile exception if the container was not in the car at the time probable cause to search was developed. Rincon, 970 N.W.2d at 284-85 (collecting cases). "[T]he location of the container at the point at which probable cause arises is the critical determination." State v. Maloney, 489 P.3d 847, 854 (Idaho 2021).

Such is the factual scenario presented in this case. After being stopped, Bauler searched for her proof of insurance without luck. Deputy Vander Berg suggested Bauler bring her papers with her and sit in the squad car while Vander Berg ran her driver's license. (State's Ex. 5 at 19:42:10 – 19:43:48). Bauler brought a stack of papers and her purse into the squad car. (State's Ex. 5 at 17:43:58 – 17:44:09). While Bauler was in the squad car and Vander Berg was preparing the citation and warning, Officer Rohmiller conducted a dog sniff of Bauler's car, and the dog alerted on the passenger side door. (Supp. Tr.

vol. I, 9:10-12) (State's Ex. 5, at 19:54:15 – 19:54:27) (State's Ex. 13, p. 1) (Conf. App. p. 18). At the time of the dog sniff and the alert, Bauler's purse was in the squad car with her. It was not in her car at the time probable cause to search her car was developed. Accordingly, Rincon and Eubanks do not control the outcome of this case.

"[T]he exceptions to the warrant requirement should be 'jealously and carefully drawn.' " State v. Ochoa, 792 N.W.2d 260, 278 (Iowa 2010) (quoting Jones v. United States, 357 U.S. at 493, 499 (1958)). "[T]here must be a 'showing by those who seek [the exception] that the exigencies of the situation made that course imperative.' " Id. (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)). The fact that Bauler's purse was not in the car at the time probable cause arose to search the car is dispositive of the question whether the police had the right to search it. Accordingly, the search of the purse was not permitted under the automobile exception and violated her rights under the Fourth Amendment and article I, section 8.

D. Conclusion. Because Bauler's purse was not inside the car at the time of the dog sniff and alert, the police were not permitted to search it without a warrant under the automobile exception and the district court erred in denying Bauler's motion to suppress. Bauler's convictions should be vacated and her case remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.87, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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